

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 96-105

In the Matter of

Amendment of Section 73.202(b), RM-8793
Table of Allotments,
FM Broadcast Stations.
(Ely, Hermantown and
Pine City, Minnesota)

**NOTICE OF PROPOSED RULE MAKING
AND ORDER TO SHOW CAUSE**

Adopted: April 22, 1996;

Released: May 7, 1995

Comment Date: June 28, 1996

Reply Comment Date: July 13, 1996

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Harbor Broadcasting, Inc. ("petitioner"), proposing the substitution of Channel 221C3 for Channel 221A at Hermantown, Minnesota. Petitioner also requests modification of its construction permit for Channel 221A to specify operation on Channel 221C3 (BPH-950206MS). Petitioner further requests the substitution of Channel 233A for Channel 221A at Ely, Minnesota, and substitution of Channel 265A for Channel 221A at Pine City, Minnesota, to accommodate the upgrade at Hermantown.

2. Petitioner's engineering analysis indicates that its proposal would result in an overlap of the proposed Channel 221C3 1mV/m contour and the Grade B contour of a television station operating on Channel 6 (Station KBJR-TV, Superior, Wisconsin). Petitioner provides an engineering study demonstrating the effect of allotting Channel 221C3 to Hermantown on the availability of all classes of educational stations that are assigned to Zone II.¹ Petitioner states that its request would have no significant preclusive impact on noncommercial educational FM stations on Channels 218, 219 and 220. Further, the entire preclusion area falls over Lake Superior in an area where it is not possible to construct a new station. Petitioner contends that there is no preclusionary impact from the allotment of Channel 221C3 at Hermantown. It is felt that since there are no communities of 1,000 or more in the preclusion area, the proposed upgrade will have no adverse impact on

new noncommercial educational stations on Channel 220A. Petitioner points out that adoption of its proposal will result in Channel 221A being deleted from both Pine City and Ely, Minnesota, which will eliminate the preclusionary effect of these two allotments on the upper portion of the reserved band. The adoption of this proposal may actually increase the availability of spectrum for new noncommercial educational FM stations in the area.

3. We believe the public interest would be served by proposing the substitution of Channel 221C3 for Channel 221A at Hermantown, Minnesota, since it would provide a wide area FM service for Hermantown and the surrounding area. Channel 221C3 can be allotted to Hermantown in compliance with the Commission's minimum distance separation requirements at petitioner's specified site.² As requested, we shall also propose to modify the construction permit for Channel 221A to specify operation on Channel 221C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of channel 221C3 at Hermantown or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties. To accommodate the upgrade at Hermantown, we shall also propose the substitution of Channel 233A for Channel 221A at Ely, Minnesota, and substitution of Channel 265A for Channel 221A at Pine City, Minnesota, and modification of the license for Station WELY-FM and Station WCMP-FM respectively. The substitutions at Ely and Pine City can be made in compliance with the Commission's spacing requirements at the licensed sites for Stations WELY-FM and WCMP-FM.³ Since the communities of Ely, Hermantown and Pine City are all located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence will be requested for these allotments.

4. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. See *Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Petitioner has stated its intention to reimburse Stations WELY-FM, Ely, and WCMP-FM, Pine City, for all reasonable expenses incurred in changing their frequency to the new channel.

5. In view of the fact that Hermantown could receive a wide coverage area FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No.	
	Present	Proposed
Ely, Minnesota	221A	233A
Hermantown, Minnesota	221A	221C3
Pine City, Minnesota	221A	265A

¹ Petitioner has provided a preclusion study demonstrating the impact of allotting Channel 221C3 to Hermantown on the availability of Class A, C3, C2, C1 and C noncommercial educational allotments on Channel 218, 219 and 220 in accordance with the *First Report and Order* in MM Docket No. 86-144, 52 Fed. Reg. 8259, March 17, 1987.

² The coordinates for Channel 221C3 at Hermantown are 46-49-30 and 92-17-00.

³ The coordinates for Channel 233A at Ely, Minnesota, are 47-53-40 and 91-51-50. The coordinates for Channel 265A at Pine City are 45-54-07 and 92-57-25.

6. IT IS ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, Boundary Waters Broadcasters, Inc., licensee of Station WELY-FM, Ely, Minnesota, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 233A in lieu of Channel 221A and Pine City Broadcasting Company, Inc., licensee of Station WCMP-FM, Pine City, Minnesota, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 265A in lieu of Channel 221A.

7. Pursuant to Section 1.87 of the Commission's Rules, Boundary Waters Broadcasters, Inc. and Pine City Broadcasting Company, Inc., may not later than June 27, 1996, file a written statement showing with particularity why their respective authorizations should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Boundary Waters Broadcasters, Inc. and/or Pine City Broadcasting Company, Inc. to furnish additional information. If Boundary Waters Broadcasters, Inc. and/or Pine City Broadcasting Company, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Boundary Waters Broadcasters, Inc. and Pine City Broadcasting Company, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the following:

Pine City Broadcasting
Company, Inc.
Station WCMP
RR Two
Pine City,
Minnesota 55063

Boundary Waters
Broadcasters, Inc.
Station WELY
904 South Central Avenue
Ely, Minnesota 55731

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **June 28, 1996**, and reply comments on or before **July 13, 1996**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Timothy E. Welch
Hill & Welch
1330 New Hampshire Ave., N.W. Suite 113
Washington, D.C. 20036

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.